laid down in such cases. The suggestion found in these and other Supreme Court decisions that the remedy for legislative oppression or injustice is political and not judicial can afford little comfort in cases like those of the oleomargarine manufacturers, who are so few in number as to be wholly unable to cope, either before Congress or before the people, with the far more numerous class of persons interested in the dairy and kindred business. Perhaps the only answer to the query thus suggested is that here as in many other cases, under our form of government, the "tyranny of the majority" must often prevail.*

PLEADING CONTRIBUTORY NEGLIGENCE UNDER THE CODE.—There is a great deal of confusion in the cases as to the proper method of raising the issue of contributory negligence. A recent decision by the Court of Appeals of Kentucky applies an important and clearly correct principle in the construction of an answer purporting to plead this defense. The plaintiff brought an action for personal injuries, and the defendant filed an answer averring that the injury was caused by "his [plaintiff's] own carelessness and negligence." This, the court held, did not raise the issue of contributory negligence, for the reason that it charged the neglect as *wholly* that of the plaintiff, whereas a plea of contributory negligence is substantially a plea in confession and avoidance and is based upon the notion that the injury results from the defendant's negligence *combined with* the concurring negligence of the plaintiff. *Newport, L. & A. Turnpike Co.* v. *Pirmann* (1904), 82 S. W. 976.

A recent case in North Carolina, though not referred to by the Kentucky court, fully sustains the position taken. This is *Cogdell* v. *Railroad* (1903), 132 N. C. 852, 44 S. E. 618. The court says: "It is alleged in the answer that the intestate's death was not caused by any negligence of the defendant, but by his own negligence. This is not a sufficient statement of the defense of contributory negligence. Indeed, it is not a statement of contributory negligence at all, for the law, when contributory negligence exists, presupposes the negligence of the defendant, which is denied in the answer in this case. * * * What is said in the answer is nothing more than an averment that there was no negligence on the part of the defendant and that the intestate's death was caused solely by his own negligence. * * * This is not a case of defective or indefinite statement, but an entire failure to plead the defensive matter." This opinion was rendered on a rehearing. On the first hearing of the case, reported in 130 N. C. 319, 41 S. E. 541, the court had held that the answer *did* raise the issue of contributory negligence.

The same principle is asserted in substance in a recent decision by the Supreme Court of South Carolina. *Kennedy* v. *Railway Co.* (1901), 59 S. C. 535, 38 S. E. 169. There was filed in this case merely a general denial, and it was sought to introduce under it evidence showing that the injury had been caused solely by the negligence of the plaintiff. The court held that such evidence was admissible on the ground that it was in its nature

*The CHIEF JUSTICE, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM dissented from the opinion of the Court in the *McCray* case, and the CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM dissented from the opinion in the *Cliff* case. Unfortunately the dissenting opinions have not been accessible to the writer of this note.

negative respecting the allegations of the complaint. In the course of a very able and carefully reasoned opinion it is decided that while the defense of contributory negligence is substantially a defense in confession and avoidance, and hence must be pleaded to be available, the defense that the plaintiff's negligence was the exclusive cause of the injury confesses nothing, but goes wholly to defeat the case made by the complaint, and hence may be proved without being pleaded.

In spite of the logical soundness of this view, it has not always been adhered to. Thus in *Western Union Telegraph Co.* v. *Jeanes* (1895), 88 Tex. 230, 31 S. W. 186, the defendant alleged that the plaintiff's "injuries were caused directly and proximately by plaintiff's own negligence," and the court held that this was sufficient to admit proof of contributory negligence.

Upon the further question as to whether, in any event, a general averment of contributory negligence is sufficient, there is much difference of authority. In Kentucky it has been held that such an averment is sufficient, and the facts constituting the contributory negligence need not be averred. *Chesapeake & Ohio Ry. Co.* v. *Smith* (1897), 101 Ky. 104, 42 S. W. 538. The same rule obtains in South Carolina as the common practice in the State courts, but the United States Circuit Court for that district has refused to approve the practice, and in the recent case of *McInerney* v. *Virginia-Carolina Chemical Co.* (1902), 118 Fed. 653, sustained a motion to make such an answer more definite and certain. A similar motion was held to be proper in *Price* v. *Water Co.* (1897), 58 Kan. 551, 50 Pac. 450. On principle this view appears to be correct.

PRESUMPTIONS AS TO DELIVERY OF DEEDS.—It goes without saying that the intent is the vital thing in connection with the matter of delivery. But the presence in the mind of the grantor of an intent to deliver is ineffectual unless he has evidenced that intent by some act or acts that the law recognizes as sufficient to indicate that he has parted with the legal control of the instrument. It follows, then, that in every case involving the question of delivery, the facts assume a controlling importance, and that, in a way, each case must stand by itself, and be decided by the application of a few general principles to its particular facts. But there are certain facts and circumstances which, though not in themselves controlling upon the question of delivery, give rise to presumptions of importance in connection with that question. For example, where a duly executed deed is in the hands of the grantee named therein, a strong presumption arises that the deed has been delivered, and this presumption will be overcome only by clear and convincing evidence. *Inman* v. *Swearingen,* 198 Ill. 437, 440, 64 N. E. Rep. 1112. (See, also, *Butrick* v. *Tilton,* 141 Mass. 93, 6 N. E. Rep. 563; *Hathaway* v. *Cass,* 84 Minn. 192, 87 N. W. Rep. 610; *McGee* v. *Allison,* 94 Iowa, 527, 531, 63 N. W. Rep. 322.) And in the absence of proof of an understanding that a deed is to be delivered at a particular time or some other evidence as to the intention of the parties as to the time of the delivery, a presumption arises of a delivery on the day of its date. *Atlantic City* v. *New Auditorium Pier Co.,* 63 N. J. Eq. 644, 667. So if a deed is recorded by a grantor, a presumption of delivery is raised. *Luckhart* v. *Luckhart,* 120